89-1829

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION,
Petitioner,

vs.

TODD GANDER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether evidence and instruction should be permitted on the issues of the effect of taxes on future lost earnings and the non-taxability of a jury's award of damages in a diversity action.

II. Whether a circuit court of appeals can recognize that a jury instruction is misleading, confusing, unclear and ambiguous, recommend against its use in future cases, and yet permit a judgment to stand that was based upon that instruction.

LIST OF PARTIES

The parties to this proceeding are petitioner FMC Corporation and respondent Todd Gander. In compliance with Supreme Court Rule 28, petitioner attaches Appendix H as a list of its parents, subsidiaries, and/or affiliates.

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, FMC Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on January 12, 1990.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 892 F.2d 1373 (8th Cir. 1990) and is reprinted in the Appendix at p. A-10.

JURISDICTIONAL STATEMENT

Invoking diversity jurisdiction under 28 U.S.C. §1332, respondent brought this suit in the United States District Court for the Eastern District of Missouri. On March 15, 1988, the

jury returned a verdict in favor of plaintiff and the trial judge entered judgment in the amount of $200,000. *See infra* Appendix at A-1. On July 13, 1988, the trial judge amended the jury's award to $2,000,000 and entered judgment in that amount. *See infra* Appendix at A-2. On November 8, 1988, the trial judge denied the petitioner's motions for reconsideration and for other relief. *See infra* Appendix at A-8.

On petitioner's appeal, the Eighth Circuit, on January 12, 1990, affirmed the judgement of the District Court. *See infra* Appendix at A-9. On February 22, 1990, the Eighth Circuit denied petitioner's petition for rehearing. *See infra* Appendix at A-48.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This matter stems from a personal injury case tried before the United States District Court for the Eastern District of Missouri under diversity jurisdiction. The case was tried using the substantive law of Missouri on theories of strict products liability and negligence.

During trial FMC was prevented from cross-examining or arguing regarding the effects of federal income tax on plaintiff's lost income stream and on the jury's award, and from submitting instructions on those issues. Further, over FMC's objections, a single verdict form propounded by plaintiff was submitted to the jury referring both to the strict liability theory and to the negligence theory and further asking the jury to assess plaintiff's "total damages."[1]

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[1] Under Missouri law then in effect, a plaintiff's contributory fault did not reduce a defendant's liability on a strict liability claim. A plaintiff's contributory negligence did, however, reduce recovery on a negligence claim to the extent the plaintiff was found to be at fault.

The jury found for plaintiff on the strict liability theory, and assessed his fault at 90% on the negligence theory. The jury found total damages to be $2,000,000.00. The verdict form's closing note, however, stated that "the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assessed to plaintiff." *See infra* Appendix at A-37-38. The trial judge observed on the record that the note directed him to reduce the total damages assessed by the fault attributed to plaintiff, and entered judgment on March 15, 1988, for $200,000.00.

Some four months later, on July 13, 1988, the court reversed itself by granting plaintiff's motion to amend judgment and entered judgment against FMC Corporation in the amount of $2,000,000.00. On November 8, 1988, the trial judge denied FMC Corporation's motions for reconsideration, to amend the July 13, 1988 judgment, and for a new trial. On January 12, 1990, following briefing and argument by the parties, the Eighth Circuit affirmed the judgment of the district court despite strong dissent. *See infra* Appendix at A-10-32. On February 22, 1990, the Eighth Circuit denied FMC's Petition for Rehearing En Banc and Petition for Rehearing by the Panel.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit Court of Appeals' decision approving the exclusion of evidence, argument and instruction on the effects of federal income tax on plaintiff's lost income stream and on the taxability of a final award is in conflict with a decision of the Seventh Circuit Court of Appeals on the same issues.

With its decision, the Eighth Circuit upheld the trial judge's exclusion of evidence, argument and instruction as to the effects of federal income tax on the lost income element of the jury award and the effects of income taxes on the final award itself. Thus, the decision of the Eighth Circuit is in direct conflict with the Seventh Circuit Court of Appeals' decision in *In re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7th Cir. 1983), a case that, like the present case, arose under diversity jurisdiction and applied state substantive law. In that case, the Seventh Circuit held it was error to refuse evidence and instruction such as was offered and refused in the instant case. These issues arise in virtually every case in which a loss of future income is claimed as an element of damages and this Court should grant certiorari to resolve the conflict on these key issues. Without a resolution of this conflict by this Court, a defendant in a diversity case within the Seventh Circuit will have its rights adequately protected in regard to these issues, while a similar defendant in a case within the Eighth Circuit will be subject to the possibility of a windfall verdict.

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), this Court addressed the question of whether evidence should be received and instruction given as to the effect of income taxes on projected future earnings and as to the nontaxability of an award in a case brought in a state court under the Federal Employers' Liability Act ("F.E.L.A."). After the Illinois Appellate Court had affirmed the refusal of evidence

and instruction on the tax issues, this Court reversed, recognizing that a wage earner's income tax is a "demonstrably relevant factor" in determining lost future income. *Id.* The Court further stated that absent the proper guidance on federal income tax law, "it is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Id.* at 496. The Court, therefore, held that in an F.E.L.A. action, in which the question of damages is governed by federal law, evidence and instruction on the effect of taxes on projected lost wages and on the non-taxability of the final award should be given. *Id.* at 498.

In *In re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7th Cir.), *cert. den.*, 464 U.S. 866 (1983), the Seventh Circuit applied this Court's *Liepelt* holding in addressing the questions of whether evidence should be received as to income tax liability on lost earnings and whether instruction should be given as to the non-taxability of an award in a diversity case brought under state substantive law. *Id.* at 1191-92. Although the Seventh Circuit recognized that the state courts had disapproved of such evidence and had directly refused jury instructions on the tax issue, the court held that the refusal of the evidence and instruction constituted reversible error. *Id.* at 1196, 1199.

Regarding the admissibility of evidence concerning the effect of taxes on future lost income, the Seventh Circuit held that the district court was not bound by state evidentiary rules because federal, not state, rules of evidence govern the admissibility of evidence in diversity cases. *Id.* at 1193. Moreover, the court stated that state law on the admissibility of such evidence did not, to the extent it was not a misinterpretation of the Internal Revenue Code, clearly differ from federal law on the issue of damages to be awarded. *Id.* at 1195-97. Thus, the court held that federal evidentiary rules would apply and that it was error to refuse evidence on the tax effects on the projected lost in-

come stream proposed by the plaintiff. *Id.* at 1200. That is directly contrary to the Eighth Circuit's holding in the present case.

The Seventh Circuit also held that the refusal to instruct the jury as to the non-taxability of the award was error despite clear state law approving the refusal of such an instruction in a state court trial. The court recognized that the rationale of the *Liepelt* case should not be limited to F.E.L.A. cases because the taxability of an award under the Internal Revenue Code is uniquely a question of federal tax law. *Id.* at 1199. Thus, the Seventh Circuit held that federal law as set out in *Liepelt* should control the instruction as to the effect of the federal tax code. *Id.* The Seventh Circuit recognized that under both state and federal law a plaintiff is not entitled to receive a bonus beyond compensatory damages. *Id.* at 1200.[2] Because the absence of an instruction as to the federal tax code's effect on an award would invite an inflated award by the jury, the court held that the taxability instruction should have been given despite contrary state procedure. *Id.* at 1200.

In the instant case, the Eighth Circuit Court of Appeals' opinion directly conflicts with the Seventh Circuit's opinion in *In re: Air Crash Disaster.* Counsel for FMC attempted to cross-examine plaintiff's witnesses as to the effect of income taxes on projected lost wages evidence, but the district court sustained objections to such questioning. Counsel was thereafter prevented from arguing the point to the jury in closing argument. FMC was also prohibited from informing the jury that any final award made to plaintiff would not be subject to federal income tax. The Eighth Circuit approved of the rejection of that evidence, argument, and instruction, basing its deci-

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[2] Similarly, Missouri law only permits recovery of "such sum as will fairly and justly compensate plaintiff for any damages [the jurors] believe he sustained and is reasonably certain to sustain in the future." Missouri Approved Instructions 37.03 (1986 New).

sion purely on Missouri law and explicitly rejecting *In re: Air Crash Disaster:*

> [T]his court in *Adams* specifically rejected a Seventh Circuit case [*In re: Air Crash Disaster*] which applied *Liepelt* in a diversity case.

See infra Appendix at A-26 (referring to *Adams v. Fuqua Indus., Inc.*, 820 F.2d 271 (8th Cir. 1987)).

In making its determination that Missouri law prohibits cross-examination regarding the effect of income taxes on a projected lost income stream, the Eighth Circuit relied upon *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), which the court believed to be the controlling case on the issue. *Dempsey,* however, was a Missouri decision on an F.E.L.A. action decided in 1952 and was subsequently viscerated by the ruling in the 1980 *Liepelt* case, in which this Court recognized that it is now well-settled that issues pertaining to damages in an F.E.L.A. case, including the propriety of cross-examination on the effect of income taxes, are to be decided under federal, not state, law. *Liepelt,* 444 U.S. at 493.

Additionally, *Dempsey,* the sole case relied upon by the Eighth Circuit regarding this issue, was ignored by the Missouri Supreme Court in its most recent opinion discussing cross-examination in regard to the effect of income taxes on a lost wages projection. In *Nesselrode v. Executive Beechcraft, Inc.,* 707 S.W.2d 371 (Mo. 1986), the Missouri Supreme Court referred to evidence introduced "through cross-examination that decedent's projected stream of lost-income does not take into consideration his income tax obligations," without any suggestion of impropriety and without any citation to the *Dempsey* opinion. *Id.* at 388. Thus, the most recent statement by the Missouri Supreme Court made after *Liepelt* does not disapprove of such evidence. The Eighth Circuit, in its opinion, conceded that Missouri law on this issue is less than "clear" and is "somewhat clouded," but refused to apply federal law on this

issue and approved the exclusion of the evidence held admissible by the Seventh Circuit in *In re: Air Crash Disaster.*

Regarding the refusal to permit argument and instruction on the taxability of the award at issue, the Eighth Circuit merely pointed to Missouri cases and the Missouri Approved Instructions, which do not require an instruction on non-taxability of awards. On the other hand, the Seventh Circuit in *In re: Air Crash Disaster* held the refusal of an instruction on this issue to be erroneous *despite* the fact that the Illinois state courts had expressly refused instruction on the taxability of awards in state cases. This holding is in direct conflict with that of the Eighth Circuit in the instant case. Indeed, the Eighth Circuit acknowledged that it was rejecting the holding of the *In re: Air Crash Disaster* court.

When the decisions of two circuit courts of appeals are in conflict such as in the case at bar, certiorari should be granted to resolve the conflict. *See, e.g., McElroy v. United States,* 455 U.S. 642, 643 (1982); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 373 (1981). This is particularly true on issues such as these where the effect of taxes on lost wages and the taxability of awards pursuant to the federal Internal Revenue Code is a key issue in virtually every personal injury action. This Court should grant certiorari to resolve this split of authority that will subject certain defendants to the possibility of windfall judgments in conflict with the purposes behind compensatory damage awards under both federal and state law. Lower courts need guidance from this Court as to whether parties are entitled to introduce evidence and submit jury instructions regarding the effects of federal income tax on lost wages and on final awards.

II.

The Eighth Circuit majority's decision pertaining to the verdict form departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The Eighth Circuit, in its 2-1 decision and despite the strong dissent of the Honorable Judge Henley, affirmed the district court's judgment despite the majority's own "reservations about the verdict form" at issue, a verdict form that the majority labeled variously as "misleading," "confusing," "unclear," and "ambiguous." *See infra* Appendix at A-16-19. The majority went so far as to recommend that the verdict form not be used in future cases in the Eighth Circuit, while permitting its use against FMC in this case. *Id.* at A-17 (footnote 2). In other words, the majority, by its recommendation, effectively admitted that the verdict form was improper, yet was willing to permit it to be used in this case so long as it was never used again.

The Eighth Circuit's recommendation that this verdict form not be used again does not mean that FMC is the only party affected by the majority's one-time approval of this admittedly improper form. Rather, the majority's attitude toward its role of supervising accuracy and fairness in district courts represents a far more serious threat to the integrity of the system itself. The Eighth Circuit's abdication of its role as the district court's guiding hand on the propriety of instructions virtually invites the district courts to dispense with careful scrutiny of form instructions for the purpose of eliminating "misleading", "confusing," "unclear," or "ambiguous" language.

This Court and the appellate courts have traditionally exercised great vigilance to correct and eliminate defective jury instructions and forms. If the view of the Eighth Circuit remains unchallenged, errors in jury instructions no longer need be corrected on appellate review. Instead, they can be dealt with through prospective "recommendations." Indeed, there is no

reason to believe that such "recommendations" will be limited to questions involving jury instructions; similar advice pertaining to procedural and evidentiary issues, for example, is easily envisioned. It is precisely this type of departure (along with its ominous portents) from the accepted and usual course of judicial proceedings that requires the supervisory power of this Court.

It is a longstanding rule in this Court that instructions must be couched in language of such definite and legal interpretation as to not mislead either the court or the jury as to its precise meaning; misleading instructions are grounds for reversal. *See, e.g., Jones v. Randolph,* 14 Otto 108, 26 L.Ed. 671, 672 (1881) ("we cannot but think this charge was misleading. . . . this leads to a reversal of the judgment"); *see also Winn v. Patterson,* 9 Pet. 663, 9 L.Ed. 266, 272 (1835) (confirming that ambiguous and general instructions "ought not to have been given"). This rule has traditionally been followed in the circuit courts, where it has been held that jury instructions must ensure that the jury understands the issues in the case and is not misled in any way. *See e.g., Ragsdell v. Southern Pac. Transp. Co.,* 688 F.2d 1281, 1982 (9th Cir. 1982); *Wright v. Wagner,* 641 F.2d 239, 242 n. 4 (5th Cir. 1981). The majority's decision even departs from the jury instruction standards announced by the Eighth Circuit in past decisions. *See, e.g., Monahan v. Flannery,* 755 F. 678, 681 (8th Cir. 1985) (reversal required where instructions did not fairly and correctly set forth the law); *Slater v. K.F.C. Corp.,* 621 F.2d 932, 937-38 (8th Cir. 1980) (failure to properly instruct requires new trial). The decision is a major retreat from the accepted role of appellate courts to supervise the decisions of the trial courts and is a departure from the accepted and usual course of judicial proceedings to such a vast extent as to call for the exercise of this Court's power of supervision as contemplated by Supreme Court Rule 17.

The function of a reviewing court with respect to jury instructions is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to applicable principles

of law. *See, e.g., Rohner, Gehrig & Co. v. Capital City Bank,* 655 F.2d 571, 580 (5th Cir. 1981). From the Eighth Circuit's own opinion, surely it cannot be said that the verdict form at issue had no tendency to confuse or mislead the jury or that the jury may not have been misled in any way. The jury was instructed that the judge would reduce the total amount of damages by any percentage of fault assessed to the plaintiff. This was not done. The Eighth Circuit's decision, refusing to reverse the judgment but prospectively prohibiting use of the misleading instruction at issue, requires this Court's supervision.

CONCLUSION

The Eighth Circuit majority's opinion in this case directly conflicts with the decision of another federal appellate court on the federal income tax questions. Moreover, the majority's departure from the accepted and usual review of jury instructions and its approval of an instruction it admitted was misleading are precisely the type of ills to which Supreme Court Rule 17 speaks. The Eighth Circuit has created a confusing precedent, likely to generate even further confusion among the other circuits as well as within the Eighth Circuit. Plenary consideration of these matters by this Court is essential.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C (6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

JUDGMENT

(Filed March 15, 1988)

This action came on for trial before the Court and a jury, Honorable George F. Gunn, Jr., District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

It is HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff, Todd Gander, recover of the defendant, FMC Corporation, the sum of Two Hundred Thousand ($200,000.00) dollars with interest thereon at the rate of 6.71% per annum and costs.

/s/ George F. Gunn, Jr.
United States District Judge

Dated at St. Louis, Missouri
this 15th day of March, 1988.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

MEMORANDUM AND ORDER

(Filed July 13, 1988)

This matter is before the Court on plaintiff's motion to amend judgment and for new trial.

In this products liability action plaintiff Todd Gander seeks recovery for personal injuries sustained in February 1985 when his right arm was severed below the elbow when it came into contact with a conveyor belt and drive drum. Plaintiff asserted claims of strict liability and negligence against defendant FMC Corporation, the manufacturer of the conveyor belt. The case was submitted to the jury on both theories. The jury returned a verdict on the appended form, M.A.I. 35.15. M.A.I. 35.15 is the verdict form approved by the Missouri Supreme Court for the submission of strict liability and negligence where comparative fault is applicable only to the negligence theory in accordance with the decision in *Lippard v. Houdaille Ind.*, 715 S.W.2d 491 (Mo. banc 1986). The jury found in favor of plaintiff on Part I. In Part II the jury assesed 90% fault against the plaintiff and 10% against the defendant. In Part III the jury assessed plaintiff's damages at $2,000,000. On the basis of this

verdict the Court then entered a judgment for plaintiff in the amount of Two Hundred Thousand Dollars ($200,000).

Plaintiff moves pursuant to Fed.R.Civ.P. 59(e) to amend the previously entered judgment to provide that plaintiff shall recover Two Million Dollars ($2,000,000). Plaintiff contends that the Court's judgment fails to give the proper legal effect to the jury's findings as reflected in the verdict form. Upon reconsideration the Court is inclined to agree. Inasmuch as this is a case in which comparative negligence principles apply only to the jury's determination on the negligence claim and not to the strict liability claim, the jury's findings as reflected on the verdict form entitle plaintiff to a judgment in the amount of Two Million Dollars ($2,000,000). Moreover, there is no inconsistency in the jury's findings inasmuch as the strict liability finding addresses plaintiff's right to recover for injury based on product defect while the negligence finding addresses plaintiff's right to recovery based on defendant's conduct. Accordingly,

IT IS HEREBY ORDERED that the Court's previously entered judgment shall be and it is amended to properly reflect the legal effect of the jury's findings which entitle plaintiff to recover a judgment in the amount of Two Million Dollars ($2,000,000) on his claims.

IT IS FURTHER ORDERED that the judgment previously entered in this cause shall be and it is null, void and of no effect and that the judgment entered this day shall be and it is the sole and final judgment of the Court in this cause.

Inasmuch as plaintiff only seeks a new trial in the event that the Court denies plaintiff's motion to amend the judgment,

IT IS FURTHER ORDERED that plaintiff's motion for a new trial be and it is denied as moot.

Dated this 13th day of July, 1988.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

JUDGMENT

(Filed July 13, 1988)

This action came before the Court and jury with the parties having appeared in person and by their respective attorneys. The issues were duly tried and the jury rendered its verdict on March 15, 1988.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of strict liability/product defect against defendant FMC Corporation, the jury returned a verdict in favor of plaintiff, Todd Gander.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of negligence, the jury assessed percentages of fault as follows: to defendant FMC Corporation - 10%; to plaintiff Todd Gander - 90%.

WHEREAS, the jury further found the total damages of plaintiff, Todd Gander, to be TWO MILLION DOLLARS ($2,000,000.00).

WHEREFORE, it is hereby ORDER, ADJUDGED, and DECREED on plaintiff's claim for personal injury based on the theory of strict liability/product defect, that the plaintiff, Todd Gander, have and recover from defendant, FMC Corporation,

the sum of TWO MILLION DOLLARS ($2,000,000.00), together with court costs.

WHEREFORE, it is hereby further ORDERED, ADJUDGED and DECREED that plaintiff, Todd Gander, on his claim for personal injuries based on the theory of negligence, have and recover from defendant FMC Corporation, the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00), together with court costs.

It is further ORDERED that the amount of damages recoverable under that portion of this JUDGMENT based on the negligence theory shall not be in addition to the amount of damages recoverable under that portion of this JUDGMENT based on the theory of strict liability/product defect.

SO ORDERED:

/s/ George F. Gunn, Jr.
District Judge

DATE: 7/13/88

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant,

VERDICT

PART I

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of:

Plaintiff Todd Gander or Defendant FMC/Link-Belt

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

Defendant FMC/Link-Belt	10%	(zero to 100%)
Plaintiff Todd Gander	90%	(zero to 100%)
Total	100%	(zero OR 100%)

PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be

$2,000,000.00/Two Million Dollars
(stating the amount)

Dated this 15th day of March, 1988.

(Original signed by foreperson)
Foreperson

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,
vs.
FMC Corporation,
Defendant.

ORDER

(Filed Nov. 8, 1988)

IT IS HEREBY ORDERED that defendant FMC Corporation's motion for reconsideration and to amend this Court's judgment of July 13, 1988 be and it is denied.

IT IS FURTHER ORDERED that defendant FMC Corporation's motion for a new trial be and it is denied.

Dated this 8th day of November, 1988.

/s/ George F. Gunn, Jr.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823EM

Todd Gander,
Appellee,

v.

FMC Corporation,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri.

JUDGMENT

(Filed March 6, 1990)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 12, 1990

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of appeals, Eighth Circuit

Mandate Issued, 3/2/90

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823

Todd Gander,
Appellee,

v.

FMC Corporation,
Appellant.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: September 13, 1989

Filed: January 12, 1990

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

FMC Corporation appeals a judgment in favor of Todd Gander for $2,000,000, entered on July 13, 1988, following a jury trial. Gander's theories of recovery for personal injuries sounded in both strict liability in tort and negligence, and the jury found in favor of Gander on both claims. The jury also assessed Gander's comparative fault on the negligence claim at

II. DISCUSSION

A. The Verdict Form

FMC argues on appeal that the district court erred both in submitting to the jury Gander's verdict form, which it argues was confusing and inaccurate, and in amending judgment. While the arguments are closely related and both ultimately turn on whether the verdict form correctly stated Missouri law, we treat the arguments separately.

The verdict form was submitted by Gander, and was taken from the Missouri Approved Jury Instructions. MAI 35.15 illustration (3d ed. Supp. 1989) (the form is indicated as Verdict A, and is taken from MAI 36.01 and 37.07). The form used is approved, at least as an illustration, by the Missouri Supreme Court for the submission of both strict liability and negligence claims, and was new at the time of trial. Brief for Appellant at 9. It contains three parts,[1] the first dealing with the strict liabili-

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[1] Beginning with Part I, the verdict form reads as follows:

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of: _____

* * *

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

* * *

ty claim, the second with comparative fault on the negligence claim, and the third with total damages. The difficulty the district court had, and the arguable error in the form, stems from the closing note, which explains the reduction in damages for plaintiff's comparative fault on the negligence claim.

After the jury had been dismissed, FMC remarked that the verdict appeared to be $200,000; i.e., $2,000,000 total damages reduced by the 90% fault assessed to Gander. Trial Transcript, vol. 3, at 270. Gander argued that the verdict was for $2,000,000, since the jury found for Gander on the strict liability claim, which could not be reduced by Gander's comparative fault. *Id.* at 272. The district court replied: "Not based on the note on part three." *Id.* After quoting the note, the court continued: "This is directing me to reduce that by 90 percent." *Id.* at 274. The district court then entered judgment for $200,000.

> NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be _____

• • •

NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Upon Gander's motion to amend, however, the district court decided that it had improperly reduced the total damages by the percentage of comparative fault assessed to Gander. "Inasmuch as this is a case in which comparative negligence principles apply only to the jury's determination on the negligence claim and not to the strict liability claim, the jury's findings as reflected on the verdict form entitle plaintiff to a judgment in the amount of Two Million Dollars ($2,000,000)." Memorandum and Order, No. 87-1155C(6), July 13, 1988, at 2.

To the extent that FMC argues that the district court erred in amending its judgment, we disagree. "The decision to grant or deny a Rule 59 motion is committed to the sound discretion of the trial court." *A. W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 165 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987); *Slater v. KFC Corp.*, 621 F.2d 932, 939 (8th Cir. 1980). Under Missouri law, which we are bound to apply in this diversity case, *see Walker v. Paccar, Inc.*, 802 F.2d 1053, 1055 (8th Cir. 1986), the district court was correct in amending the judgment. Missouri law is clear that a verdict resting on a strict liability claim cannot be reduced by a plaintiff's comparative fault. In *Lippard v. Houdaille Indus.*, 715 S.W.2d 491 (Mo. 1986), the Missouri Supreme Court held that "the plaintiff's contributory negligence is not at issue in a products liability case." *Id.* at 493. The court explained that negligence on the part of plaintiff should neither prohibit nor reduce plaintiff's recovery on a strict liability claim. "We adhere to the view that distributors of 'defective products unreasonably dangerous' should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness." *Id.* at 494. As defense counsel admitted at oral argument, the judgment of $200,000 under the strict liability theory was clearly incorrect as a matter of Missouri law. Therefore, we find no abuse of discretion by the district court.

This does not, however, end the matter. FMC's argument is better stated in terms of the verdict form's correctness. That is,

the fact that the amended judgment properly reflected Missouri law does not mean that the verdict form itself did not misstate Missouri law or unduly confuse the jury. Thus, FMC argues that the form was incorrect as a matter of law, or, in the alternative, that it was so confusing that the intent of the jury is unclear. The jury may, indeed, have been misled by the closing note, which could be read (as first read by the district court) to apply comparative fault to the strict liability claim as well as to the negligence claim. On its face, the note is not specifically limited to one negligence claim. Nor does the note specifically apply to the strict liability claim. Because of this ambiguity, the jury, according to FMC, may have been led to conclude that total damages would be reduced by any percentage of fault assessed to Gander, even though it found in Gander's favor on the strict liability claim. Hence, FMC argues, the jury probably intended that Gander receive only $200,000, and thus assessed total damages of $2,000,000 because it thought that total damages would be reduced by 90%. We must, therefore, consider whether the verdict form is legally incorrect or unduly misleading.

While it is a close question, we do not think that the verdict form misstates Missouri law. FMC agreed at oral argument that the difficulty with the form stems from the closing note, which, as indicated, can be read to require a reduction, based on plaintiff's comparative fault on the negligence claim, in the strict liability claim. Although the note leaves open this possibility, it does not, as the district court initially thought, *require* it. Because of its grammatical structure and location, the note is somewhat misleading. The note can be read to indicate a connection between a finding of contributory fault on the negligence claim and a reduction in total damages. *If* the jury assesses a percentage of fault to any defendant, *then* "the judge *will reduce*" total damages accordingly. The reduction in damages thus can be caused by the jury assessing fault, regardless of any finding on the strict liability claim. While this is a possible reading of the note, it is not a required reading.

However, as a matter of law, the note is not incorrect; it is simply unclear. Given that Missouri law is clear that the judge cannot apply comparative negligence principles to the strict liability claim, the strict liability claim will, in fact, be unaffected by any percentage of fault assessed to plaintiff on the negligence claim. The note does not require otherwise, and thus is not legally incorrect. It does not misstate Missouri law.

The verdict form is, however, at least potentially confusing to the jury.[2] We must, therefore, consider whether the form, taken together with the instructions to the jury, is so misleading or confusing that the jury verdict cannot stand. In determining whether the verdict form is confusing, we must consider it in light of the instruction given. *See United States v. Hines,* 728 F.2d 421, 427 (10th Cir.), *cert. denied,* 467 U.S. 1246 (1984). It is enough if the "charge as a whole . . . state[s] the governing law fairly; technical imperfections or a lack of absolute clarity will not render the instructions erroneous." *Toro Co. v. R & R Products Co.,* 787 F.2d 1208, 1215 (8th Cir. 1986). We find that the jury was correctly and adequately instructed on Missouri law, and, therefore, that the verdict form, not clearly wrong, also is not so confusing that the jury verdict must be upset.

The important inquiry is whether the jury was properly instructed that damages were to be calculated regardless of any fault assessed to plaintiff on the negligence claim. Initially, we note that the verdict form itself is clear and correct on this mat-

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[2] Although we hold that the verdict form is technically correct, and that we cannot set aside the jury verdict in this case, we recommend that the form not be used by the federal district courts of this circuit as presently written. The form could be substantially clarified by simply eliminating the concluding note, which FMC agreed at oral argument is the main problem with the form. MAI 37.03 as written in the MAI 35.15 illustration clearly and correctly instructs the jury on the same matters which the concluding note attempts to cover. The note is, therefore, unnecessary. If a note is deemed to be required, several alternative versions that clarify the problem readily come to mind.

ter. In Part III, in which the jury finds total damages, the form states: "We, the jury, find the total amount of plaintiff's damages *disregarding any fault on the part of plaintiff* to be ____" (emphasis added). This instruction that comparative fault is *not* to be considered in calculating total damages is much clearer than is any inference from the concluding note that might lead the jury to inflate total damages in anticipation of a reduction for plaintiff's comparative fault on the negligence claim. Instruction number 18 further provided that, if the jury found in favor of Gander on the strict liability claim, or assessed a percentage of fault to FMC on the negligence claim, then

> disregarding any fault on the part of plaintiff, you must determine the total amount of his damages to be such sum as will fairly and justly compensate him for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

Moreover, the jury was specifically instructed, through instruction number 18, that it should calculate total damages regardless of plaintiff's fault. "In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff." Instruction number 18, *see also* MAI 37.03 (3d ed. 1989 Supp.). Thus, the district court correctly instructed the jury that its function was not to determine the amount of plaintiff's recovery, but to determine the amount of plaintiff's total damages. Any efforts by the jury to calculate damages in terms of plaintiff's recovery would be contrary to the court's instructions.

Not only was the jury properly instructed on its role in calculating damages, but the district court also properly instructed the jury that comparative fault principles do not apply to strict liability claims. Instruction number 18 provided that: "The judge will compute any recovery *on plaintiff's claim for personal injury based on negligence* by reducing the amount you find as plaintiff's total damages by any percentage of fault you

assess to plaintiff." Instruction number 18, *see also* MAI 35.15 illustration (3d ed. Supp. 1989) (emphasis added).[3] Thus, while the verdict form may be unclear about whether its concluding note applies to the strict liability claim, the instructions were quite clear that the jury finding on comparative fault does not so apply. As a whole, the instructions correctly and specifically instructed the jury about the ambiguities the form may have created. Given this correct and explicit instruction, it is mere speculation that the jury calculated total damages at $2,000,000 in anticipation of a reduction for plaintiff's comparative fault on the negligence claim.

Moreover, mere speculation that a jury verdict may have been based on the jury's own misunderstanding of the law, even though properly instructed, is an insufficient basis on which to upset a jury verdict. "It is well settled that a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict." *Chicago, Rock Island & Pacific R.R. v. Speth,* 404 F.2d 291, 295 (8th Cir. 1968). In *Speth,* the jury assessed plaintiff's contributory negligence at 40% and awarded $16,000 in damages. The district court, *sua sponte,* asked the jury whether its damage award was net or gross. The jury responded that its calculation was a net figure, compensating for plaintiff's contributory negligence. The jury thus intended for plaintiff to recover $16,000. When the district court sent the jury back to recalculate damages,it returned with a figure of $40,000. On appeal, this court reversed and remanded for a new trial on the issue of damages. *Id.* at 296. This is not to say, however, that when a jury verdict "on its face shows a clear disregard for the

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[3] MAI 37.03, from which the illustration is drawn, differs materially from the illustration and from the instruction given at trial. MAI 37.03 does not discuss alternate theories of liability submitted to the jury, and thus the specific reference to Gander's claim based on negligence, emphasized in the text above, varies from MAI 37.03.

court's instructions," *id.* at 295, it cannot be corrected. But given correct instruction on the law and no clear disregard for that instruction on the face of the verdict, a jury verdict must remain immune from questioning by the district court and from speculation by an appellate court that the verdict may be based on a misunderstanding of the law. Whether the jury misunderstood a correct instruction of the law is an improper subject for mere speculation. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 59.08[4], at 59-115 to 116 (1989) ("a verdict cannot be upset by speculation"); *id.* at 59-127 ("A mere suspicion, however, that the jury has not followed the court's instructions is not sufficient, since that would make the verdict too valnerable and would needlessly prolong litigation."); *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 490 (5th Cir. 1987) ("Whether or not the jury misunderstood the charge of the court is not a question to be reexamined after the verdict has been rendered.") (citation omitted).

Our holding finds support as well in the cases which, based on Federal Rule of Evidence 606(b), forbid improper impeachment of a jury verdict. While no improper impeachment occurred in this case, Rule 606(b) establishes that it would have been improper to inquire of the jurors what they really intended by their verdict. In *Karl v. Burlington Northern Ry. Co.*, 880 F.2d 68 (8th Cir. 1989), the jury returned a verdict in a personal injury action in favor of plaintiff. *Id.* at 69. The jury found plaintiff to be 75% at fault, *id.* at 70 n.3, and assessed damages at $273,750. The jury was instructed to assess damages "without taking into consideration any reduction of the plaintiff's claim due to her own negligence." *Id.* at 70 n.4. The district court, however, called the jury foreman at the request of plaintiff's counsel, to determine whether the jury calculated damages without regard for plaintiff's contributory negligence. *Id.* at 71. The jury foreman explained that $273,750 was 25% of what plaintiff asked for, and was what the jury intended plaintiff to recover. *Id.* The district court then amended judgment to reflect actual damages of $1,095,000. *Id.* at 72.

Thus, given the substantial evidence supporting the jury's calculation of damages at $2,000,000, the correct instruction of the law, and mere speculation that the jury may have intended to award Gander only $200,000, we cannot set aside the jury verdict on the ground that the verdict form was unclear.

B. Income Taxes

FMC next argues that the district court erred in not permitting cross-examination of Gander's witnesses about the effect of income taxes on Gander's lost income. FMC first attempted to cross-examine Viscusi, the economist who testified about Gander's lost wages. FMC asked Viscusi whether the figures he was using were in terms of gross income. Counsel then asked whether Gander would actually get those gross dollars, to which Gander objected. Trial Transcript, vol. 1, at 340-41. At the bench, Gander said that under Missouri law, income tax assessments were inappropriate subjects for cross-examination, and that any contrary holdings from FELA cases could not apply in this diversity case. *Id.* at 342. FMC suggested that it should be able to cross-examine the economist, but when asked by the court whether the law was clear that such cross-examination was permissible, FMC counsel responded: "I think I can." *Id.* at 343. The district court allowed FMC to cross-examine on income taxes, but also said that it would grant a mistrial if Gander were able to show that such cross-examination was improper. *Id.* at 344. FMC made no further efforts to cross-examine Viscusi about income taxes.

The second exchange over income taxes occurred at the bench, when FMC presented to the court *Nesselrode v. Executive Beachcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986), which FMC said permitted cross-examination on income taxes. Trial Transcript, vol. 2, at 2-3. The district court noted, however, that *Nesselrode* made the law no clearer, and thus adhered to its original ruling. *Id.* at 4.

FMC then attempted to cross-examine Crawford, Gander's witness from the union. Counsel asked Crawford, who testified

about wages earned by coal conveyor operators at Anheuser-Busch, whether his figures were net or gross. Gander objected on the basis of the previous discussions, and this time the objection was explicitly sustained. *Id.* at 70-71.[5]

Finally, FMC tendered an instruction on reduction to present value, which it then linked to the issue of whether the total award was subject to income taxation. *Id.* vol. 3, at 214-15. Gander objected to the instruction and the court agreed, thus precluding FMC from arguing the taxability of the award to the jury. *Id.* at 215.[6] It is somewhat unclear from the objections and the discussions at trial whether FMC appeals from the district court's rulings on cross-examination or from the district court's refusal to instruct the jury that the judgment was not subject to income taxation. In either case, however, Missouri law is clear that the trial court did not err in its rulings.

We must first consider the appropriate governing law, for FMC argues in its brief that these issues are controlled by *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980) and *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). In *Liepelt,* and FELA action, the Supreme Court considered whether the

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[5] While the district court's initial ruling on Gander's first objection to FMC's cross-examination was to conditionally allow it subject to the same sort of cross-examination. Thus, while Gander argued at oral argument that FMC could not appeal from the district court's ruling in its favor, we think that FMC's claim that it was effectively prohibited from undertaking its proposed cross-examination is essentially accurate.

[6] It is clear that the prior discussions related only to cross-examination about the effects of income taxes on Gander's lost income. With reference to the present value instruction and proposed argument on income taxes, however, FMC makes reference to Gander's income tax liability on the judgment, a different matter. Trial Transcript, vol. 3, at 215. FMC may have been concerned that the jury would inflate the judgment to compensate for income taxes if it were not informed that the judgment is not subject to income tax.

jury should receive both evidence of the effect of income taxes on lost wages and an instruction on the taxability of a final award. As to the effects of taxes on a lost income stream, the Supreme Court held that such evidence was neither too speculative nor complex for a modern jury to understand, and thus was proper to establish after-tax earnings. *Liepelt,* 444 U.S. at 494. The Supreme Court also held that it was error to refuse to give an instruction that the final award was not subject to income tax. *Id.* at 498.[7] FMC argues that these cases establish that the district court erred in its rulings.[8]

These cases, however, are not controlling. We have specifically held, in *Adams v. Fuqua Indus.,* 820 F.2d 271 (8th Cir. 1987), that *Liepelt* does not control in non-FELA cases. In *Adams,* appellant argued that the rationale of *Liepelt* transcends the FELA context and that it should, therefore, apply in diversity actions. *Id.* at 276. This court rejected the argument, and, in considering an instruction on the taxability of an award, held that: "Whether to give or withhold a taxability instruction is a question of state law, which we are bound to follow." *Id.* at 277. More generally, the law is perfectly clear that "when a tort action is brought in federal court pursuant to diversity jurisdiction, basing liability on state law, the court must apply state law in regard to availability and computation of damages." *Id.* (quoting *Losey v. North American Philips Consumer Electronics Corp.,* 792 F.2d 58, 61-62 (6th Cir.

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[7] The Supreme Court relied in part on the Missouri case, *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952). The approved instruction was as follows: "Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Liepelt,* 444 U.S. at 492.

[8] *Jones & Laughlin* essentially follows *Liepelt,* and holds that in calculating a lost income stream, income tax evidence is appropriate. "Since the damages award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits." *Jones & Laughlin,* 462 U.S. at 534.

1986)). Moreover, this court in *Adams* specifically rejected a Seventh Circuit case[9] which applied *Liepelt* in a diversity case. We defer instead to "Missouri's right to create its own law free from federal interference." *Adams,* 820 F.2d at 278. Thus, we apply Missouri law.

Missouri law is clear that it is not error for a court to refuse to give an instruction that an award is not subject to income taxation. At one time, Missouri law favored such an instruction. In *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), an FELA case, defendant argued error in the court's refusal to give an instruction that no income tax would be assessed on the judgment. *Id.* at 43-44. The Missouri Supreme Court agreed, finding no reason not to give the instruction, especially given the danger that the jury could incorrectly overcompensate for taxes on the judgment. It was, therefore, error to refuse the instruction. *Id.* at 45. More recent Missouri cases, however, establish that *Dempsey* has been superseded by Missouri Approved Jury Instructions (MAI) outside of the FELA context, and that it is not error to refuse such an instruction.

The Missouri Court of Appeals reviewed several decisions on this issue in *Tennis v. General Motors Corp.,* 625 S.W.2d 218 (Mo. Ct. App. 1981). Noting that *Dempsey* was an FELA case and was decided before the Missouri Approved Jury Instructions were approved by the Missouri Supreme Court, the court explained its ruling in *Senter v. Ferguson,* 486 S.W.2d 644 (Mo. Ct. App. 1972),in which the court held that it was error to give the same instruction given in *Dempsey.* In *Tennis,* the court explained that *Senter* was a post-MAI case, and that MAI 4.01, not *Dempsey,* controlled the instruction issue in a non-FELA case. MAI 4.01, the only permissible and authorized damage instruction in a non-FELA case, explicitly did not incorporate the *Dempsey* FELA instruction. Thus, to give the instruction

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[9] *In re Air Crash Disaster,* 701 F.2d 1189 (7th Cir.), *cert. denied,* 464 U.S. 866 (1983).

would be error, since the instruction is "clearly an addition to or 'modification' of MAI 4.01." *Tennis,* 625 S.W.2d at 226. Moreover, the second edition of MAI did not include the *Dempsey* instruction even in its damage instructions for FELA cases, MAI 8.01 and 8.02. Following the Supreme Court decision in *Liepelt,* however, both FELA instructions were modified in the third edition to contain the charge that " 'any award you may make is not subject to income tax.' " *Id.* at 227. "It seems worthy of note that although FELA instructions MAI 8.01 and 8.02 were changed in the 3rd Edition of MAI in compliance with *Norfolk,* MAI [4.01] has not been altered nor amended to include a direction that any awarded damages are 'not subject to income tax.' " *Id.* Thus, in *Tennis,* the Missouri Court of Appeals found no error in the lower court's refusal to give the instruction in a non-FELA case.

Again, in *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83 (Mo. 1985), appellant argued error in the court's refusal to give a similar instruction. *Id.* at 96. The Missouri Supreme Court reviewed the law, and affirmed the lower court. "The trial court here cannot be convicted of error, requiring a new trial, in following the established law of this state." *Id.* at 96.

Thus, to the extent that FMC presented the court with an instruction that the judgment would not be subject to income taxation, we find no error in the district court's refusal to give such an instruction.

Missouri law is somewhat less clear, however, regarding the admissibility of evidence relating to the effects of income tax on a lost-income stream. The controlling case appears to be *Dempsey.* In *Dempsey,* defendant argued on appeal that the trial court had erred in refusing to permit defendant to cross-examine plaintiff's witness about the effects of income tax on a personal injury award. *Dempsey,* 251 S.W.2d at 43. The Missouri Supreme Court held that:

> The trial court did not err either in refusing to permit defendant to cross-examine plaintiff's actuarial witness

> relative to income tax liability or in refusing to permit defendant to argue to the jury that in arriving at the amount of its award it should consider only the amount of future earnings lost to plaintiff after deduction of income taxes for which he would have been liable had he continued his employment without injury.

Id. at 45. While it is unclear as to whether FMC's attempted cross-examination concerned Gander's tax liability on the award or the effects of income taxes on lost income, the Missouri court's reference to defendant's proposed argument is exactly on point. This is precisely what FMC attempted to do in this case, and it is this point of law about which FMC admitted to the district court that it was uncertain. To the extent that *Dempsey* is the controlling law, the district court did not err in refusing FMC's proposed cross-examination.

The issue is somewhat clouded, however, by *Nesselrode,* 707 S.W.2d 371. FMC argues that in *Nesselrode* the Missouri Supreme Court explicitly found the sort of cross-examination that FMC attempted to be permissible. By implication, FMC argues that *Nesselrode* silently overrules the precise holding of *Dempsey* which found no error in refusing exactly the sort of cross-examination FMC attempted. We do not agree that *Nesselrode* controls this case.

Indeed, whether a defendant can cross-examine about the effects of income taxes on plaintiff's lost income stream was not even at issue in *Nesselrode.* Rather, the context in which the court makes the reference to cross-examination on which FMC relies concerns a dispute about the reduction of lost income to present value. Both parties in *Nesselrode* argued error in failing to establish the present value of plaintiff's lost income. Specifically, defendant argued that the court should not have allowed the jury to consider a table indicating plaintiff's lost income, since the table contained no reductions to present value. *Id.* at 385-86. The Missouri Supreme Court characterized the issue

even more narrowly. It found the issue to be whether defendant could object to the trial court's ruling on plaintiff's presentation of lost income when defendant itself failed to present any evidence of present value. *Id.* at 387.

In this context, the court mentioned in passing that while defendant did not challenge plaintiff's presentation of present value, defendant did challenge plaintiff's claim for damages. "This was done by presenting evidence in connection with decedent's history of health problems, questioning the three daughters' monetary reliance on decedent, and by *pointing out through cross-examination that decedent's projected stream of lost-income does not take into consideration his income tax obligations.*" *Id.* at 388 (emphasis added). We do not believe that this passing reference to cross-examination can be interpreted in such a way as to overrule *Dempsey*. The propriety of the cross-examination was not at issue in *Nesselrode* and was not addressed by the court. Nor, apparently, was the cross-examination in *Nesselrode* the subject of an objection by plaintiff's cou;nsel at trial. This language in *Nesselrode*, then, is just a mere, isolated reference in passing to the sort of cross-examination attempted by FMC. This same sort of cross-examination, by contrast, was specifically addressed in *Dempsey*. FMC presented no persuasive law to the district court in support of such cross-examination, and it likewise presents none here. Thus, we find no error in the district court's ruling.

III. CONCLUSION

We have considered FMC's other arguments on appeal and find them to be without merit. For the reasons stated, we affirm the judgment of the district court.

HENLEY, Senior Circuit Judge, dissenting.

I respectfully dissent.

The majority acknowledges that the note at the end of the verdict form was confusing; so confusing, in fact, that the

district judge read it one way at trial, only to reach a radically different interpretation a few months later. The majority even goes so far as to recommend that the form as it is now written not be used in future cases. Nevertheless, the court is unable to conclude that use of the form was improper here.

If the district court had given an appropriate instruction that the plaintiff's fault would not reduce his recovery under the strict liability claim, I might be less concerned about the verdict form. The majority points out that the trial judge instructed the jury to find the total amount of damages "disregarding any fault on the part of the plaintiff" and that the jury was told the plaintiff's recovery for negligence would be reduced by the percentage of his fault. These directives, however, provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instructions and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault. In these circumstances, I do not believe that the "charge as a whole . . . state[d] the governing law fairly." *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1215 (8th Cir. 1986).

There is another troublesome aspect to this case. The majority summarily dismisses without discussing the defendant's argument that the district court should have defined the term "defective condition" in instructing the jury regarding the strict liability theory. The trial judge described in explicit detail what would constitute negligence on the part of the defendant and the plaintiff. *See, e.g.*, Instruction No. 14 (instructing jury to assess a percentage of fault to the defendant if at the time the coal conveyor was sold, the conveyor "had an in-running nip point and shear edge at the transfer chute and was therefore dangerous when put to a use reasonably anticipated"); Instruction No. 16 ("The term 'negligent' or 'negligence' as used in these instructions with respect to Todd Gander means the failure to use that

degree of care that an ordinarily careful and prudent coal conveyor operator would use under the same or similar circumstances."). In contrast, the district court gave no description of what facts would warrant a finding that the conveyor was sold in a "defective condition," as required by the strict liability theory. Given that the district court's ultimate decision regarding the plaintiff's recovery was based on the outcome of the strict liability claim without any regard to jury's findings on the negligence cause of action, it is ironic that the jury had such explicit instructions regarding what particular facts would constitute negligence while being left with no guidance at all regarding the definition of a "defective condition."[1]

Concededly it might be permissible for a trial judge not to give an instruction regarding the definition of a "defective condition" in a single issue products liability action involving a simple consumer good. Yet I cannot agree that a jury may be left with no guidance at all on the definition in a case involving factory equipment with which few typical jurors can be expected to be familiar, and in a case where negligence is defined and the jury can infer from the verdict form that recovery on either negligence, strict liability, or both will be reduced by the percentage of plaintiff's fault.

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[1] The Missouri Supreme Court has indicated in dicta that the Missouri approved jury instructions (MAI) require that the jury not be given a definition of "defective condition." *See Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 378 & n.11 (Mo. 1986) (en banc); *see also Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 837 (Mo. Ct. App. 1984). We have held, however, the MAI provide only guidance, not binding authority, for the giving of instructions in a federal diversity case. See, e.g., Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1134-35 (8th Cir. 1989); *cf. Cowens v. Siemens-Elema AB*, 837 F.2d 817, 822 (8th Cir. 1988) (rejecting argument that *Nesselrode* reasoning prohibited the district court in a diversity case from defining the term "unreasonably dangerous" as used in a strict liability instruction).

I recognize that the plaintiff suffered a grievous injury that might warrant a two-million dollar damage award. I am concerned, however, that the award be the result of a verdict which is free of the taints that affect the one here. Thus, I would reverse and remand for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 88-2823-EM

Todd Gander,
Plaintiff/Appellee,

v.

FMC Corporation,
Defendant/Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

APPELLANT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

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TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
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APPELLANT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

Eighth Circuit Appellate Procedure Rule 16(d) Required Statement:

The undersigned express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following question of exceptional importance: the majority opinion, in addition to being grossly unjust to appellant FMC Corporation, creates an extremely lax rule of harmless error that permits the appellate court to "recommend" that substantial errors be avoided in the future without ensuring that a fair trial is afforded to the parties in the case at issue.

INTRODUCTION

This panel, in a 2-1 decision and despite the strong dissent of the Honorable Judge Henley, affirmed the district court's judgment against FMC Corporation [hereinafter "FMC"] and in favor of plaintiff Todd Gander for $2,000,000. The judgment was affirmed despite the majority's own "reservations about the verdict form" at issue, a verdict form that the majority labelled variously as "misleading," "confusing," "unclear," and "ambiguous." (The verdict form at issue is reproduced, for the Court's convenience, in its entirety on the following page.) The majority went so far as to recommend that the verdict form not be used in future cases, while permitting its use against this defendant. Thus, despite the fact that the verdict form was chosen by and submitted by plaintiff, objected to at trial by defendant, and despite its being so flawed that it led the trial judge to read it one way at trial and in a completely different way four months later, and so unclear as to be effectively banned by the majority from future use in this Circuit, the majority is unwilling to conclude that use of the form was improper in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant,

VERDICT

PART I

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of:

Plaintiff Todd Gander or Defendant FMC/Link-Belt

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

Defendant FMC/Link-Belt	10%	(zero to 100%)
Plaintiff Todd Gander	90%	(zero to 100%)
Total	100%	(zero OR 100%)

PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be

$2,000,000.00/Two Million Dollars
(stating the amount)

Dated this 15th day of March, 1988.

(Original signed by foreperson)
Foreperson

Note: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

FMC brought this appeal on several points, and continues to believe that any one of them provides a sufficient basis for reversal of the district court's judgment (particularly those points regarding the effects of income taxes on plaintiff's lost income stream and whether "defective condition" should have been defined for the jury, a point Judge Henley labelled in dissent as "troublesome" and by itself a sufficient ground for reversal; *see Dissenting Opinion of Henley, J.*, at 23-24). Unquestionably, however, the central point of the appeal is plaintiff's verdict form. For the majority to conclude as it has is patently unfair to FMC and amounts to a gross injustice. Of urgent import to this Court, however, and requiring the Court's attention en banc, is the majority's creation of an extremely lax rule of harmless error that permits the appellate court to "recommend" that substantial and prejudicial errors be avoided in future cases without ensuring that a fair trial is afforded the litigants in the case from which the issue arose.

A. The majority permits use of the verdict form against FMC in this case, but "recommends" that it not be used in future Eighth Circuit cases

Perhaps the most perplexing aspect of the majority opinion is footnote 2. There, the majority states that although it finds the verdict form to be technically correct, it nevertheless "recommend[s] that the form not be used by the federal district courts of this circuit as presently written." *Majority Opinion* at 8 n.2. With due respect to the Court, it is baffling to FMC that the majority, with this footnote, appears to admit that the verdict form is improper, yet is willing to permit it to be used at the expense of FMC in this case. This is patently unfair to FMC, and suggests the following absurdity: if this panel had ruled against FMC on the verdict form points, but reversed on one of the other points and remanded the case for a new trial, presumably footnote 2 would prevent use of the verdict form at the retrial even though it was found "technically correct" by the majority.

On its face, it appears that the majority intends, with footnote 2, that only FMC be victimized by this verdict form. A closer reading of the footnote, however, reveals a precedent of far greater implication and importance to this Court: the footnote serves to curtail appellate review of misleading jury instructions, an area in which appellate courts have traditionally exercised great vigilance. The panel's decision signals a major retreat from the standard of review that has characterized the Eighth Circuit in past decisions. *See, e.g., Monahan v. Flannery,* 755 F.2d 678 (8th Cir. 1985); *Slater v. KFC Corp.,* 621 F.2d 932 (8th Cir. 1980); *see also Toro Co. v. R & R Prods. Co.,* 787 F.2d 1208 (8th Cir. 1986). The opinion extends an unfortunate invitation to the district courts to dispense with careful scrutiny of form instructions for the purpose of eliminating "misleading," "confusing," "unclear," or "ambiguous" language. The district courts' incentive to avoid errors is reduced if errors are not corrected on appeal and are instead dealt with only through prospective "recommendations." The administration of litigation in this circuit requires more than this.

Moreover, the footnote arguably deprives FMC of its rights to due process under the Fifth and/or Fourteenth Amendments to the United States Constitution. American jurisprudence recognizes that courts must adhere to previously declared rules for adjudicating a claim or at least not deviate from those rules in a manner that is unfair to the entity against whom the action is to be taken. In this case, FMC is deprived of the protection afforded by the panel to future litigants from precisely the ills and result at issue here. The precedent set with this opinion is already widely viewed as proscribing the use of the verdict form. *See Court Urges Against Use of MAI 35.15 Verdict Form,* Mo. Law. Weekly, January 22, 1990, at 1. As a consequence of the "recommendation," FMC alone is left with no recourse while the rights of future litigants will remain intact. Surely, this represents an untenable and unfair result.

B. The majority's characterizations of the verdict form conflict with its holding

In the first paragraph of its opinion, the majority admits its own "reservations about the verdict form." *Majority Opinion* at 1. The majority then acknowledges that the "jury may, indeed, have been misled by the closing note" of the verdict form, *id.* at 7; a note the Court also found to be ambiguous, *id.;* and "unclear," *id.* at 8. Then, after straining to conclude that the form does not misstate Missouri law, the panel admits that the "form is, however, at least potentially confusing to the jury." *Id.* at 8. Similar characterizations may be found in several other places as well. *See id.* at 8-10. Nevertheless, the panel holds the form to be proper. Finally, the majority, despite its holding, "recommend[s] that the form not be used by the federal district courts of this circuit as presently written." *Id.* at 8 n.2.

The majority opinion with regard to the verdict form is problematic—and unfair to FMC—for a number of reasons. First, the majority apparently fails to take into account the fact that the verdict form was submitted by plaintiff, and yet is construed against FMC. The panel's reasoning would be less obscure had the form been submitted by FMC; certainly, FMC could then more understandably be held accountable for the numerous problems the majority acknowledges to be present. Instead, the form was submitted by plaintiff and given to the jury over FMC's objection. FMC should not be made to bear the consequences of a verdict form submitted by plaintiff that is "confusing," "ambiguous," "unclear," and "misleading."

The majority also fails to attach any significance to the fact that the verdict form was, as stated by Judge Henley in dissent, "so confusing . . . that the district judge read it one way at trial, only to reach a radically different interpretation a few months later." *Dissenting Opinion of Henley, J.,* at 22. As the trial judge stated on the record with regard to the form's closing note, "This is directing me to reduce [the verdict] by 90 percent." *Trial Transcript,* vol. 3, at 274. The improper nature

of the form, in the face of the trial judge's own opinion at the time of trial—and original entry of judgment for $200,000—is self-evident. Indeed, the trial judge's reversal serves to underscore the impropriety of the verdict form.

C. **The verdict form misstates Missouri law**

The majority apparently resolves, to its satisfaction, the foregoing points with its conclusion that the verdict form "does not misstate Missouri law," *Majority Opinion* at 8; and is therefore proper, albeit only in this instance. *Id.* at 8 n.2. In reaching that conclusion, the majority first acknowledges that the closing note "can be read to require a reduction, based on plaintiff's comparative fault on the negligence claim, in the strict liability claim." *Id.* the Court then writes that "[a]lthough the note leaves open this possibility, it does not, as the district court initially thought, *require* it." *Id.* that statement, in light of the Court's conclusion that the form does not misstate the law, is problematic for two reasons: first, it contradicts what the majority admits is one reading of the form; second, and more importantly, if the note can be read to require a reduction in the strict liability claim, as the Court admits, then that *is* a misstatement of Missouri law. Assuming, *arguendo,* that the form correctly stated the law, it did so in a manner so unfair and inadequate as to adversely affect FMC's substantive rights. In such instances, reversal and remand for a new trial is required. *See, e.g., Monahan v. Flannery,* 755 F.2d 678 (8th Cir. 1985) (reversing on ground that jury was not fairly or adequately instructed).

Once it concludes that the verdict form does not misstate the law, the majority attempts to justify its holding with several lines of reasoning that really are not germane to this appeal. First, the Court observes that, given correct instruction, a jury's misunderstanding or misapprehension of the law cannot be used to impeach a verdict. *Majority Opinion* at 11. FMC has never maintained that the jury misunderstood what it was told or that

it failed to follow the district court's instructions. The majority also notes that although no improper impeachment occurred in this case, if impeachment had occurred, it would have been improper. *Id.* at 12-13. Again, this was not at issue. Finally, the panel points out that plaintiff's injuries support a verdict for $2,000,000. *Id.* at 13-15. FMC has never disputed the extensive and serious nature of plaintiff's injuries. The injuries by themselves, however, beg the question of causation. If a man shoots himself through the head with a handgun, he will obviously suffer great injury, but that alone does not entitle him to damages from the manufacturer of the gun. Moreover, in the case at bar, the jury assessed plaintiff's total damages to be $2,000,000, but also found him to be 90% at fault, a point largely ignored by the majority. The damages question must be considered in light of plaintiff's fault: although the panel may be correct that plaintiff's injuries, by themselves, support a $2,000,000 verdict, it is equally correct that the reduced verdict is entirely appropriate in view of the overwhelming fault the jury assessed to plaintiff.

D. The jury was never informed that comparative fault does not apply to strict liability

The Court next states that "the district court also properly instructed the jury that comparative fault principles do not apply to strict liability claims," and quotes as support Instruction 18, which concerns the reduction of a recovery on the negligence claim. *Majority Opinion* at 10. The standard to be applied in such analyses is whether the instructions as a whole "*fairly and fully* presented the issues to the jury." *Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 720 (8th Cir. 1982) (citations omitted) (emphasis added). Nowhere in the instant charge is there any instruction telling the jury that plaintiff's fault would not reduce his recovery under the strict liability claim. As stated by Judge Henley in dissent, the directives contained in the instructions:

> provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instructions and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault.

Dissenting Opinion of Henley, J., at 22-23.

Compounding this unfairness was the district court's refusal to define the term "defective condition" in instructing the jury regarding the strict liability theory, despite FMC's request that it do so. As stated by Judge Henley, although the trial judge "described in explicit detail what would constitute negligence," the court "gave no description of what facts would warrant a finding that the conveyor was sold in a 'defective condition,' as required by the strict liability theory." *Dissenting Opinion of Henley, J.,* at 23. In light of the trial court's—and the majority's—findings that plaintiff's recovery was based solely on the strict liability claim, with the 90% fault assigned to plaintiff thereby relegated to irrelevance, it is indeed troublesome that the jury was provided no guidance at all as to the meaning of strict liability or its constituents.

The issue of whether comparative fault applies to strict liability was neither "fairly" nor "fully" presented to the jury; indeed, it cannot be maintained that Instruction 18 or any other instruction in the charge provided the jury with any guidance whatsoever on this critical point or even told the jury what "strict liability" or its elements mean. Moreover, even assuming that Instruction 18 could reasonably be extended as suggested by the majority, "[a]n error as to a specific instruction 'is not cured by general statements which set out the respective contentions.' " *Monahan,* 755 F.2d at 684 (citation omitted). The panel's holding represents a marked shift away from the long line of Eighth Circuit decisions requiring fair, full, and

adequate instructions on the law, a shift this Court should reconsider.

E. The majority's position requires as much speculation as does the view that the jury intended to award $200,000

Part of the Court's hesitancy to reverse the trial court apparently stems from its belief that to do so would require it to speculate that the jury calculated the total damages in anticipation of a reduction by the trial court for plaintiff's comparative fault. *Majority Opinion* at 11. FMC submits, however, that a finding that the jury intended plaintiff to receive $2,000,000 and not $200,000 requires every bit as much speculation. Indeed, there are many reasons to believe the jurors intended the smaller award, not the least of which is the attribution of 90% fault to plaintiff. Although ignored by the majority, there was ample testimony at trial to support such a substantial assessment of fault to plaintiff.[1]

A primary purpose of review of a trial court's instructions is to ensure that the jury has not been left to guess about the proper application of the law to the facts of the case. The mere fact that one must speculate at all as to the jury's intent serves only to highlight the unfairness of the verdict form.

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[1] To cite but one example, plaintiff's expert engineer, Boulter Kelsey, admitted that plaintiff, as a competent operator of the machine in question, would have recognized the danger associated with its use. *Trial Transcript,* vol. 1, at 282.

CONCLUSION

FMC is entitled to a determination of damages "free of the taints that affect the one here." *Dissenting Opinion of Henley, J.*, at 24. The trial of this case took only five days. Surely a new trial is a reasonable way to ensure both that the verdict be free of those taints and that FMC be afforded the protection the majority provides future litigants through its "recommendation" contained in footnote 2.

The verdict form at issue here was grossly unfair and unjust to FMC. The cure of gross injustice may serve as basis for en banc consideration of an appeal. *See, e.g., United States v. Lynch,* 690 F.2d 213, 215 n.22 (D.C. Cir. 1982). Further, this Court should revisit the ominous precedent established by the panel through its prospective "recommendation." Accordingly, FMC respectfully requests rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing was mailed, postage prepaid, this 26 day of January, 1990, to: James E. Hullverson, Jr., Esq., The Hullverson Law Firm, 1010 Market Street, Suite 1550, St. Louis, MO 63101, counsel for appellee.

/s/ John C. Shepherd

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823EM

Todd Gander,
Appellee,

vs.

FMC Corporation,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The suggestion for rehearing en banc filed by appellant has been considered by the court and is denied by the reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

February 22, 1990

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX H

Subsidiaries and Affiliates of Petitioner

Asia Lithium Corporation
Asia Pacific Agricultural Development Corporation
CBV - Industria Mecanica, S.A.
The Chitin Company, Inc.
Cimflex Teknowledge Corporation
Centocor, Inc.
Coproqui S.A.
Electro Quimica Mexicana, S.A. de C.V.
Fabricacion, Maquinaria y Ceras, S.A. de C.V.
FMC Agroquimica de Mexico, S. de R.L. de C.V.
FMC Employees Service Corporation
FMC Foundation
FMC Gabon S.A.R.L.
FMC Gold Canada Ltd.
FMC Gold Company
FMC Gold International Sales Corporation
FMC Guatemala, S.A.
FMC (Ireland) Ltd.
FMC Jerritt Canyon Corporation
FMC-Kramer S.A. Industria Comercio
FMC de Mexico S.A. de C.V.
FMC Minerals Corporation
FMC Nurol Savunma Sanayii A.S.
FMC Paradise Peak Corporation
FMC Petroleum Equipment Limited
P.T. FMC Santana Petroleum Equipment Indonesia
FMC Saudi Arabia Limited
FMC Services & Supplies Occidente, S.A.
FMC Services & Supplies Oriente, S.A.

FMC (Thailand) Limited
FMC Wellhead de Venezuela, S.A.
Food Machinery Coordination Center, S.A.
Foret, S.A.
Foret Arif Libanaise, S.A.R.L.
Freeport/FMC Foreign Sales Corporation
H Two O Two Limited
Huron Forge and Machine Company
Kosmos Industrial Investments and Commerce A.S.
L. H. Company, Ltd.
Link-Belt Construction Equipment Company
Natural Product Sciences, Inc.
Norfolk Investments Limited
Perorsa
Phillippine Marine Products, Inc.
S.A. Mather et Platt
SeparaSystems Inc.
Sibelco Espanola, S.A.
Thai Peroxide Company, Ltd.
Tokai Electro-Chemical Company, Limited
Tripoliven, C.A.
Turegano, S.A.